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Statement of Paul T. Hofmann, April 21, 1998
Before The Senate Committee on Commerce, Science And Transportation,
Subcommittee on Surface Transportation And The Merchant Marine

To the Honorable Members of the Subcommittee:

It is a great honor to appear before this Subcommittee, and I thank you for the opportunity to express my views, and those held by many maritime practitioners, about the pending legislation that would affect wrongful death remedies for deaths at sea.

In my 16 years of practice, my focus primarily has been on helping persons injured, and the families of those who have lost loved ones, at sea. I come before this Subcommittee to ask that it re-think the various proposals for righting the wrongs caused by the Death on the High Seas Act, 46 U.S.C. § 761 et seq. ("DOHSA"), and to adopt the straight forward legislative proposal appended to my statement.

It is clear that Congress recognizes that DOHSA is unfair because of the statute's arbitrary restriction of wrongful death remedies to only the pecuniary losses suffered by dependant relatives. DOHSA fails to recognize that the benefit of the family structure goes beyond mere payment of bills. Families are about the love, affection, services and the society they share. These are recognized in main-stream tort law as being worthy of compensation when a loved one is killed through another's fault. Yet, DOHSA slams the door on a remedy for these losses.

The Senate is being asked to make a special exception to the application of DOHSA to benefit victims of airplane accidents. As I discuss later, it is discriminatory to create yet another class of wrongful death victim, by allowing certain remedies to airplane accident victims dying on the High Seas, while excluding from those rights the families of persons who die on ships and boats on the same waters.

In my view, furthermore, the proposals before Congress which would benefit victims of airplane accidents, although well-intentioned, will fail to provide the intended benefit because of confusion about how wrongful death laws, as found within federal statutory law, under maritime common law, and state statutory and common law, apply.

What I propose is a simple amendment to DOHSA itself, not an end-run around it which tinkers with jurisdiction and applicability, and which would create a hornet's nest of legal problems, so-called "litigation about litigation". When there is a problem, I feel, the best solution is to go to the heart of the difficulty, and fix it at the source.

To help elucidate my concerns, allow me to relate a true-life situation from a case I recently handled. Our firm represented the elderly mother of Joseph Waterhouse, a 37 year- old fisherman who shipped out on the fishing boat TERRI LEI. He joined the boat with his friend, Adam Randall, who was also the boat's captain. About one week into the voyage, they set their lines for the night. After a late night telephone call in which one of the crew stated that the weather was getting rough, nothing more was ever heard again from the vessel. Our investigation led to several theories about whose negligence caused the sinking. The first cause was that it negligently was run down by a foreign cargo ship which routinely made voyages to the United States through the fishing grounds where the TERRI LEI was working. We also believe that, in violation of Coast Guard regulations, no lookout was posted on the fishing boat who could have alerted the crew to the danger. The third act of negligence which explained the loss was that the vessel sank because its owner had welded a steel plate over a large "freeing port" on the vessel's deck, in violation of Coast Guard regulations and industry standards. A freeing port is an opening in the deck rail which allows water on deck, such as comes from crashing waves, to flow quickly off the deck in a storm. With a freeing port sealed off, water gets trapped, adding tremendous weight to the boat, and disrupting its stability. This makes it susceptible to uncontrolled rolling from the ocean waves, and eventual capsizing. On the TERRI LEI, this freeing port should never have been sealed.

No matter which of these reasons caused the loss of the TERRI LEI, the experts believe

that the vessel capsized and trapped the crew within the hull, which became their dark, cold, steel coffin. As the boat flooded and sank, slowly, but inexorably, the air pocket inside evaporated, and the trapped men died.¹

The family of Joe Waterhouse received few answers about what happened to him. And later, because of the restrictive effect of DOHSA, they received little solace, and almost no compensation, for the loss of their beloved son and brother.

Mr. Waterhouse was a loving son who regularly visited his mother, and provided her financial assistance. Joe had a 10 year old boy, over whom he doted and who he supported. Unfortunately, under DOHSA, the compensation which Joe Waterhouse's whole family could prove as pecuniary loss was limited to about \$30,000. Under the prevailing interpretation of DOHSA, no other compensation could be obtained for his loss of life. Based on recent interpretations of DOHSA, furthermore, there would be no recovery even for his conscious pain and suffering before death.² He must have endured an almost unimaginable fear and mental and physical torment in those last few minutes, but under DOHSA, and the general maritime law, this terrible torture goes uncompensated.

As to Joe's family, his son will never again be able to walk on the beach with his dad. He'll never speak to him on the phone to pass the time, ask his advice, or tell a joke. Joe's mother will never again be able to sit down across the table and chat with her son over Sunday dinner, or see all of her sons together again. But none of these intangible losses can be compensated under DOHSA.

Similarly, the families of the children and adults who died on TWA 800 are limited in what

¹ In the nationwide best-seller, *THE PERFECT STORM*, there is a reference to the sinking of the *TERRI LEI*. That book, about the untimely sinking of the fishing boat *ANDREA GAIL* in another storm in the Atlantic, notes the irony of how Adam Randall turned down a job on the ill-fated voyage of the *ANDREA GAIL* only six months before he joined the *TERRI LEI*.

² See, for instance, *Bickel v. Korean Air Lines*, 96 F.3d 151 (6th Cir. 1996) and *Froman v. Korean Air Lines*, 84 F.3d 446 (D.C. 1996).

they can obtain in compensation for their horrendous tragedy. Thus, equity and fairness scream for a change to be made for the victims of all deaths at sea.

The TWA Flight 800 tragedy enlightened the public about the travesty of what several members of Congress have called the "antiquated 1920 maritime law", the same statute which prevented Joe Waterhouse's family from just compensation, DOHSA.

The simple solution to benefit all victims of deaths at sea is to amend DOHSA to allow for fair recovery for both airplane accidents victims and those victims suffering vessel-related accidents. Merely singling out airplane accident victims for special treatment is an affront to those whose family loved ones died at sea in vessel accidents.

In 1920, when DOHSA was enacted to permit lawsuits on behalf of a limited category of survivors of decedents killed by tortious conduct occurring in maritime accidents more than three miles out at sea, it was a recognition by Congress that wrongful deaths at sea should be compensated. Supreme Court decisions subsequently held that this statute also applies to deaths resulting from airplane crashes on the High Seas, to the exclusion of all other laws, including state wrongful death laws. One purpose for applying this statute to airplane crashes was to have uniformity of recovery for wrongful deaths, without certain victims' families being more favorably compensated than others, based upon non-uniform state law.

But DOHSA limits the damages recoverable to the "pecuniary" loss sustained by the persons for whose benefit the suit is brought. It has been unanimously held that his or her survivors' grief or their loss of the society of the victim is not compensable. DOHSA also has been interpreted by many courts to prevent a victim's pre-death conscious pain and suffering from being compensated.

After the Flight 800 disaster, where the town of Mountrouge, PA was decimated by the loss to the sea of 16 members of a High-School French Club, the families of these children were astounded to learn that their childrens' lives had little compensable value because of the restrictions of DOHSA to pecuniary loss. Because children, typically, do not provide pecuniary support to their parents, the family suffers little or no "pecuniary" loss when their child's life is

negligently snatched away. No compensation is allowed to the parents' for their loss of society of their children, and the children's estates are not entitled to recover for the victims' pre-death horror.

In an attempt to remedy this obvious unfairness, in 1997 the House of Representatives passed H.R. 2005 to amend Title 49, §40120(c) to exempt victims of airplane crashes from the woeful effects of DOHSA. In the Senate, Senator Spector of Pennsylvania introduced similar legislation, S.943.

The Senate bill defines a class of remedies available to covered aviation accidents, and by its restriction to those types of accidents, would exclude those victims of deaths on the seas involved in vessel related incidents. Thus, the Senate's proposed legislation would allow airplane crash victims to obtain greater remedies than would be allowed to victims of vessel-related accidents. The bill would create an indefensible "steerage class" of victims - those whose loved ones die in boating accidents. They would be denied the recoveries permitted to families of those who suffer the same deadly fate, but who were "fortuitous" enough to die while engaged in airplane travel. What if pieces of TWA 800 struck and sank a boat on the sea below killing a group of kids on a school outing? Why should the families of those in the plane be protected more so than the families of those on the boat? More fundamental, why should victims of an airplane crash on the High Seas be entitled to greater remedies than wrongful death victims of boating accidents in the same waters? Nothing can justify categorizing these unfortunate souls differently, yet the Senate bill, unless modified, would do just that.

Besides this fairness issue, the proposed legislation, in many instances, would not accomplish its intended philanthropic purposes. The legislation states that the remedy restrictions within DOHSA (limiting recovery to "pecuniary loss") shall not, with respect to covered aviation incidents, prevent recovery of any additional remedy available under common law or State law. Closer analysis, however, discloses that, in many instances, nothing would be added to the rights of victims because, under the common law, there is no wrongful death remedy. So this clause in the bill is of no consequence. Indeed, both state wrongful death laws, and DOHSA itself, were

enacted because there was no remedy for wrongful death under the common law.³ The only potential addition to the present law the bill would provide, therefore, would come from the entitlement to remedies under “State law”. But many state laws are as restrictive as DOHSA. This is so, for instance, in New York, where wrongful death claims are limited to pecuniary loss, although the estate may recover for the pre-death conscious pain and suffering of the decedent. Since Flight 800 originated in New York, an argument will be made that New York law applies to all of the victims. If so, they are little better off than they would be under DOHSA.

The legislative proposal would also be unsatisfactory because victims from different states, suffering the same aviation wrongful death incident on the High Seas, would be treated differently, based only upon the happenstance of their citizenship. This would be grossly unfair. Some families might receive no compensation for the death of a loved one, because their state statute prohibits anything but pecuniary losses, while others would be generously compensated, as a result of a home state's law being more generous in compensating victims. This would be intolerable, unreasonable and unnecessary.

The solution to all of these issues is for Congress to pass a uniform, fair DOHSA amendment, directly stating those remedies it determines are appropriate, and applying it to victims of all accidents on the High Seas.

The compromise I suggest has the support of both maritime labor⁴ and many other sections of the maritime community. The traveling public deserves the protections this proposal will provide.

³ The Supreme Court has recognized a **maritime** common law cause of action for wrongful death in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). The remedies available under this cause of action, however, are limited to those allowed by DOHSA. See, Miles v. Apex Marine Corp., 498 U.S. 19 (1990). Thus, in all respects, the inclusion of remedies under “common law” in the Senate bill provides nothing of substance to the present state of the law.

⁴ Annexed is a copy of a letter to Senator McCain from Rene Lioeanjie, Chairman of the AFL-CIO Maritime Committee, representing almost all of deep-sea labor unions. The Committee expresses its whole-hearted support for the proposal presented herewith.

To do away with the inequities described above, to truly provide fair and just compensation, and to retain uniformity in applicable remedies to all victims, irrespective of residence, Congress simply should amend DOHSA to provide for the survivors of victims of any wrongful death occurring on the High Seas to recover non-pecuniary damages, including damages for loss of society and survivor's grief, as well as allowing the estate of the victim to recover for the decedent's conscious pain and suffering. The attached proposed amendment to DOHSA would accomplish this in a straightforward manner.

Thank you for allowing me to address this distinguished subcommittee.

Respectfully yours,

Paul T. Hofmann

PROPOSED AMENDMENTS TO DEATH ON THE HIGH SEAS ACT

46 USC §762 is hereby amended as follows:

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

In all claims for wrongful death arising within the maritime jurisdiction, including covered aviation accidents, whether asserted under common law, General Maritime law or federal statute, in addition to recovery of pecuniary losses, surviving relatives of the decedent may recover for loss of the decedent's society where such losses are proven. The estate of the decedent shall also have claims for the pain and suffering of the decedent prior to death, his/her emotional suffering in contemplation of impending death, medical expenses resulting from the injury and reasonable funeral expenses.